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Office of Administrative Law Judges
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Issue Date: 02 October 2003

CASE NO.: 2002-LHC-2721

OWCP NO.: 07-154974

IN THE MATTER OF

TOMMY G. JONES,
Claimant

v.

SEALAND SERVICES, INC.,
Employer

APPEARANCES:

Diane R. Lundeen, Esq.
James E. Vinturella, Esq.
On behalf of Claimant

Lance S. Ostenford, Esq.
Carmella Williams, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, brought by Tommy G. Jones (Claimant) against Sealand Services, Inc., (Employer). The issues raise by the parties could not be resolved administratively,

and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on May 29, and 30, 2003, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their respective positions. Claimant and his wife testified and introduced twenty two (22) exhibits including: a November 18, 1999 supervisor report of accident (CX-1); medical reports from orthopedist Dr. James Butler (CX-2); functional capacity evaluations of March 29 and 30, 2000 and May 30, 2002 (CX-3, 4); Claimant's earnings records and income tax returns for 1999, 2000, and 2001 (CX-5, 6); correspondence to Claimant from claims adjusters Sue Silva and Rob Golus (CX-7, 8); correspondence between Claimant and Employer's counsels (CX-9); LS-200 and LS-208 forms dated May 20, 2002 and November 2, 2001 (CX-10, 19); memorandum of informal conference (CX-11); rehab records and reports of Angela Harold (CX-12); medical records of Drs. Robert Steiner, Robert Segura, Crosby Memorial Hospital, Kiln Medical Clinic and Pearl River Rehab and Workwise (CX-13, 14, 15, 16, 17 and 18); correspondence from Claimant's counsel to Defense counsel requesting authorization of surgery (CX-20); Iserenhagen Work Systems consistencies check list (CX-21); and Claimant's initial interview and vocational evaluation worksheet. (CX-22).[1]

Employer called two live witnesses: Joseph Shine (physical therapist and functional capacity evaluator) and Angela Harold (vocational expert) and introduced twenty nine (29) exhibits including: medical records from Crosby Memorial Hospital, Pearl River Rehab, and Drs. James Butler, D.L. Bolton, and Robert Steiner (DEF-1, 2, 3, 5, 11, 18); functional capacity evaluation of March 29 and 30, 2000 (DEF-4); Claimant's commercial driver's license (DEF-6); vocational evaluation reports of Angela Harold (DEF-7); Claimant's tax records (DEF-8); Jones Motor Group Employment records (DEF-9); Crawford and Company pay sheet (DEF-10); LS-200, 207, 208 forms of August 31, 2001, November 2, 2001, and August 14, 2002 (DEF-12, 13, 14, 15, and 16); report of Joseph Shine (DEF-17); charts showing days worked by Claimant driving truck in 2000, 2001, together with fuel receipts for those days (DEF-19a, 19b, 20a and 20b); correspondence from Claimant's counsel to Employer's counsel dated March 12, 2003 (DEF-23); map showing places driven by Claimant in 2000 and 2001 (DEF-20e); Claimant's driver logs for 2002 (DEF-24); and depositions of Drs. Steiner, Butler and accountant, Jay West. (DEF-26, 27, 28).

The parties filed post-hearing briefs. Based upon the stipulation of the parties, the evidence introduced my observation of witness demeanor and the arguments presented, I make the following findings of fact, conclusions of law and order.

I. STIPULATIONS

[1] Reference to the transcript and exhibits are as follows: trial transcript- Tr.___; Claimant's exhibits- CX__p.___; Employer exhibits-DEF__p.___. For sake of brevity witnesses are referred to by their last name.

At the commencement of the hearing the parties stipulated and I find:

1. Claimant alleges he was injured during the course and scope of his employment on November 17, 1999.

2. Claimant advised Employer of the alleged injury on November 17, 1999.

3. Employer filed a Notice of Controversion on August 14, 2002.

4. An informal conference was held on July 22, 2002.

5. Employer paid disability benefits as follows:

November 18, 1999 to August 20, 2001	- $576.11 per week	
August 23, 2001 to October 31, 2001	- $ 738.88 per week	
July 30, 2002	- $ 4,806.24	
April 4, 2003	- $ 4,937.52	
Total	-$66,400.28	(DEF-10)

6. Employer paid medical benefits of $20,615.88.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Whether Claimant injured or aggravated a pre-existing back condition on November 17, 1999.

2. Nature and extent of disability, and date of maximum medical improvement.

3. Suitable alternative employment.

4. Whether Claimant is entitled to additional medical benefits including a spinal fusion.

III. STATEMENT OF THE CASE

A. Chronology

Claimant, a 56 year old male born on April 8, 1947, has a 12th grade education and lives in Carriere, Mississippi. Prior to the alleged injury of November 17, 1999, Claimant worked for

Employer as a chassis mechanic and welder performing heavy work since his initial employment in 1987. As a chassis mechanic, Claimant performed routine maintenance on breaks, wheel seals, spring hangers axles and lights as well as repairing containers. Claimant was paid $24 per hour and worked 40 hour plus per week with core hours of 8 a.m. to 4:30 p.m. In addition, Claimant received annual royalty vacation and holiday pay after 700 hours of work. Before his employment with Employer, Claimant performed a variety of medium jobs including truck driving, stick and meg welding, carpentry (foundation, framing and trimming of houses). (DEF-7, pp. 6-8; Tr. 49-54, 459).

On November 17, 1999, at 8:50 a.m. while working under the supervision of Ken Walters, Claimant reported a back strain occurring at 8:45 a.m. while installing chassis leaf springs. In turn, Mr. Walters referred Claimant to Dr. Robert Segura at the Workwise Medical Clinic at Pendleton Memorial Methodist Hospital where he diagnosed mild strain of mid lower axial skeletal soft tissues, assigned lifting restrictions of no more than 20 to 25 pounds with no repetitive shoveling, and prescribed ice, range of motion and referral to Claimant's private physician. Thereafter, he saw Claimant on November 23, 1999, February 11, and March 8, 2000, and treated him conservatively for lumbar strain and lumbar spondylolisthesis. (CX-14, 18).

On November 18, 1999, Claimant went to his family physician, Dr. Shailendra Prasad, at the Kiln Medical Center. Following an examination, Dr. Prasad diagnosed acute lumbar strain and prescribed medication. On November 23, 1999, pursuant to Dr. Prasad's instructions, Claimant underwent lumbar spinal x-ray which revealed spondylolysis of L5 with grade 1 spondylolisthesis, degenerative disc disease at L2-L5 with mild hypertrophic spurring. (CX-14, p. 6, DEF-1). On a return visit of November 24, 1999, Dr. Prasad confirmed this assessment, prescribed Darvocet and physical therapy with alternate use of ice and heat. On a December 16, 1999 visit, Claimant exhibited paraspinal tenderness with complaints of continued back pain for which Dr. Prasad referred Claimant for orthopedic evaluation. (CX-16, 18). [2]

On January 11, 2000, Claimant saw orthopedist, Dr. James Butler on a referral from Workwise and adjuster, Crawford and Company.[3] Dr. Butler examined Claimant and found some moderate tenderness at L3 to the sacrum but no spasm, restricted range of motion, negative straight leg raising and hypoactive but symmetrical reflexes. His impression was lumbar strain, pre-existing spondylolisthesis, L5-S1 and degenerative disc disease, L2-L5, with recommendations for conservative care and use of Ultram and Darvocet. (CX-2, p. 1, 2). On a follow-up visit of February 4, 2000, Claimant was still having back pain that occasionally radiated into his legs but no numbness, tingling or burning. Claimant complained that he could not drive or sit for long periods of time due to back pain, had restricted range of motion but no spasm with some spinal tenderness. After reviewing MRI studies taken on January 26, 2000, and discussing them with Claimant, Dr. Butler concluded that Claimant had slight desiccation of the upper lumbar disc but more pronounced desiccation and degeneration at the L5-S1 disc

[2] Claimant underwent physical therapy at Crosby Memorial Hospital on December 1, 8, 10, and 13, 1999. (CX-15, pp. 9-11). Thereafter, he had additional physical therapy at Pearl River Rehab on February 9, 11, 14, 16, 21, 23 and 28, 2000. (CX-17, DEF-3).

[3] Dr. Butler's records also appear as DEF-2.

corresponding with spondylolisthesis at that level and that based upon what he had been told by Claimant further concluded that Claimant's condition had been asymptomatic prior to his alleged on the job injury only to be aggravated by the injury. Dr. Butler recommended bracing, physical therapy and epidural steroid injections. (CX-2, p. 3; CX-15, p. 8). Dr. Butler further told Claimant that his back condition pre-dated the accident. (CX-2, p. 4).

Claimant made a return visit to Dr. Butler on March 8, 2000, during which visit Dr. Butler again told Claimant that the lumbar spondylolisthesis existed before his injury which then served to possibly aggravate this condition. Claimant discussed, but declined surgery, after which Dr. Butler stated that Claimant was at maximum medical improvement (MMI), and recommended discontinuation of physical therapy with a functional capacity evaluation (FCE). On April 28, 2000, Claimant returned to Dr. Butler for a fourth visit during which Claimant complained of moderate pain. Dr. Butler discussed with Claimant the results of his FCE showing Claimant capable of doing light to medium level work, and thus, unable to perform his past mechanic work. Surgery was again ruled out as an option. (CX-2, pp. 5, 6).[4]

Dr. Butler saw Claimant on two further occasions (February 19, 2002 and February 11, 2003) for further evaluations. On the February 19, 2002 visit Claimant was again complaining of continued back pain with weakness and numbness in both legs. His exam was essentially the same as before with paraspinal tenderness but no spasm, symmetrical reflexes and restricted range of motion. Dr. Butler again found Claimant at maximum medical improvement (MMI) with an ability to work at the light to medium level of work. Dr. Butler further stated that he saw no contraindication to Claimant running his own trucking company if in fact he had been doing so since his last visit. (CX-2, pp. 8, 9).[5]

On the final visit of February 11, 2003, Claimant continued to complain of low back pain radiating down both legs to his feet. Claimant had difficulty standing with range of motion limited by pain. Dr. Butler reviewed Claimant's previous diagnostic studies and concluded that his L5-S1 spondylolisthesis remained unchanged and was the cause of his symptomatology. (CX-12, p. 12).

In contrast to the medical reports and findings of Dr. Butler, the record shows two examinations by Dr. D.L. Bolton on April 3, 2000 and March 20, 2002, wherein, the purpose of these exams was to determine Claimant's fitness to drive commercial vehicles, i.e., trucks. Claimant passed both physicals without limitation. On both exams, Claimant denied any history of spinal injuries while demonstrating no physical impairments with good reflexes and spinal motion. (DEF-5). On the second exam Claimant did admit having chronic low back pain. (DEF-

[4] A FCE was performed on March 29, 30, 2000 at Slidell Memorial Hospital Wellness Pavilion. The results indicated that Claimant was able to work at the light to medium demand level lifting 35 pounds from floor to waist, walking and standing continuously, and sitting frequently. (CX-3, DEF-4).

[5] On May 30, 2002, Claimant underwent a second FCE which showed him capable of light work lifting, carrying and pushing and pulling between 25 to 39 pounds maximum with occasional, frequent and constant lifting of 23 to 7 pounds. (CX-4).

5, pp. 2-9). Having passed both physicals, Claimant received his commercial drivers license (DEF-6) allowing him to drive interstate as indicated below.

Following Dr. Bolton's examinations Claimant underwent two additional evaluations by orthopedist, D. Robert A. Steiner on September 19, 2002, and March 27, 2003. In contrast to Dr. Bolton, Dr. Steiner was provided with details about the alleged November 1, 1999 alleged back injury and subsequent medical records, x-rays and lumbar MRI of January 26, 2000. On the September 19, 2002, exam, Claimant reported subjective and constant low back pain. Claimant presented as being in no acute distress with no antalgic gait or scoliosis with 60 degrees of lumbar flexion, 10 degrees of extension and 15 degrees of lateral bending. Sensory and reflex exams were normal. Sitting straight leg raise signs were negative as opposed to supine straight leg raise which produced bilateral back pain but no radiculopathy. Based upon a review of the diagnostic tests, exam, and medical records, Dr. Steiner opined that Claimant had degenerative lumbar disc disease and lumbar spondylolisthesis at L5-S1 with no clinical findings of lumbar nerve root impingement, irritation or neurological deficit. Dr. Steiner advised Claimant to seek light work finding him at MMI with conservative care. The exam of March 27, 2003 resulted in similar recommendations with no objective documentation of any worsening of Claimant's pre-existing back condition. Dr. Steiner agreed with Dr. Butler's recommendation for surgery only if there were serious and apparently valid subjective complaints. (DEF-11).

B. Claimant's Driving Record

After obtaining his CDL in April, 2000, Claimant purchased a Ford 450 truck and trailer and began driving for Jones Motor Group as a lease/owner/operator. On his driver application Claimant made no mention of his past employment with Employer referring to his past employer at Mitchell Trucking & Construction Co. of Carriere, where he allegedly worked from 1995 to the present as a driver, equipment operator, carpenter and welder. (DEF-9, p. 4). To obtain this job, Claimant secured the cooperation of a clerical at Mitchell Trucking, Stacy Konseh, who verified that Claimant had worked for Mitchell from October 1995 to present as an over the road driver driving in all 48 states and averaging 2000 miles per week. (DEF-9, p. 9).

In May, June, July, August, September, October, and December, 2000, Claimant drove a total of 50 days to various places in the following states: Alabama, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Texas, Tennessee, Virginia, Wisconsin.[6] In 2001, Claimant drove a total of 87 days to various destinations in Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Louisiana, Missouri, Mississippi, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, and Texas.[7]

[6] The actual days as shown on DEF-19a and 19b were as follows: May 22, 23, 24, 25, 26; June 15, 16, 17, 18, 19, 20; July 3, 5; August 30, 31; September 1, 2, 5, 6, 7, 8, 17, 18, 19, 20, 21, 22, 23, 25; October 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16,17, 18, 19, 20, 21, 22, 23, 24, 25; December 26.

[7] The actual days as shown on DEF-20a and 20b driven by Claimant in 2001 were as follows: March 18, 19, 25, 26, 27, 28, 29, 30; April 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28; May 18, 20, 21, 22, 28, 29, 30, 31; June 1, 2 ,3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15; August 30, 31; September 1, 6, 7, 8, 9, 10, 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28;

In 2002, before Claimant's truck was repossessed, he made the following trips per the only driving logs produced:

Date	Place of Origin	Destination	Mileage	Driving Time
March 2	Picayune, Miss.	West Memphis, Arkansas	370	6.25 hours
March 3	West Memphis, Arkansas	St. Louis, Missouri	553	10 hours
March 4	Rockford, Illinois	Eau Claire, Wisconsin	441	8.75 hours
March 5	Hammond, Wisconsin	Lincoln , Illinois	440	8.25 hours
March 6	Lincoln, Illinois	Durant, Mississippi	541	9.75 hours
March 7	Durant, Mississippi	Picayune, Mississippi	202	3.5 hours
March 8	Picayune, Mississippi	Cuba, Alabama	485	8.25 hours
March 9	Cuba, Alabama	Madison, Georgia	316	5.5 hours

(DEF-25)

A review of the driving logs showed Claimant taking only routine breaks for meals and fuel with an occasional shower.

C. Claimant's Testimony

After describing his education and work background which did not include work for Mitchell Trucking, Claimant described the alleged injury of November 17, 1999, testifying that he started to work on a chassis, took off the tires, cut out an old leaf spring, and began installing a new leaf spring on hangers when his back started to bother him. According to Claimant, he had difficulty installing the leaf springs because of lack of space which caused him to exert pressure

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November 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 30; December 1, 2, 3, 4, 5, 6. DEF-20 is a map of the U.S. showing the states driven to by Claimant.

to adjust the leaf springs which weighed about 75 pounds, thus, causing him to injure his back. He immediately reported the incident to his supervisor, Kenny Walters who sent him to Dr. Segura. In turn, Dr. Segura examined Claimant, told him not to anything for several days and several days later saw him a second time after which Claimant went to his family physician, Dr. Passaud, who sent him for spinal x-rays and provided conservative care. The adjuster then referred Claimant to Dr. Butler who ordered a lumbar MRI followed by physical therapy. (Tr. 58-63.)

When asked by his counsel why he returned to Dr. Butler the following senario unfolded:

Q: Okay. Why did you go back to him?
A: Well, because Crawford sent me to him; paid for me to go to him.

Q: How were you feeling when you sent to him?
A: Well, I 've always had back pain.

Q: Before this accident, had you had this type of back pain?
A: No.

Q: Before this accident, had you had any back pai[n] that kept you from going to work for more than a couple of day?
A: No.

(Tr. 65, ll. 2 to 13)

Claimant admitted not seeing Dr. Butler from April, 2000 to February, 2002, but could not remember the reason for this hiatus in treatment except to say he was trying to live with the condition. When he eventually saw Dr. Butler on February 11, 2003, this was because the pain got worse creating a throbbing sensation in his back and a feeling like he was going to lose his legs. When asked if he had other symptoms Claimant responded negatively only to change his testimony to include leg numbness when suggested by counsel. (Tr. 69, ll. 5-15). On the January 11, 2000 exam by Dr. Butler, Claimant denied having any numbness as he did on the February 4, 2000 exam. (CX-2, pp. 1, 3,). Thereafter on two additional exams in 2000, Claimant had no reports of leg numbness. The first complaint of leg numbness came only two years later on February 19, 2002 and was not repeated on the last exam of February 11, 2003. (CX-2, pp. 1-12).

Claimant testified that because of the alleged accident, he is restricted to the speed at which he can mow grass and weed eat. Picking up limbs and leaves around the house increases back pain. Sleep is poor, with leg throbbing, waking Claimant during the middle of the night. (Tr. 70, 71). Sitting in church is limited due to back pain. When asked how long he could sit, Claimant responded that he could not put a time limit on it claiming that the longer he sat or drove the worse his back hurt. (Tr. 72, 73).

Claimant then shifted his testimony to describe his contact with vocational expert, Angela Harold, and attempted to work with her to find work. Claimant testified that he applied for the job of shop welder at American Crescent but was not hired. Concerning the position of call

center associate at National Financial Publications, Claimant admittedly did not apply for this job because of a hearing defect and a desire not to talk much. As for other jobs mentioned by Ms. Harold, Claimant provided the following response:

Prospective Job	Response
shop welder at Stainless Fabrications	no application- job allegedly involved heavy work
service advisor at John Fury Motors	no application- Claimant does not like to deal with customers.
parts clerk and driver at Absolute Auto Group	no application- Claimant does not like to deal with people.
service advisor at Absolute Auto Group	no application- Claimant does not like to deal with customers and is not a salesman.
service advisor at Slidell Nissan	no application- same reason as above.
parts cashier at Robert Levis Chevrolet	no application - did not like working for car dealerships.
cashier for Bryan Harris	no application- same reason as above.
sales job at Napa Auto Parts	no application- did not like working with customers
cashier at Corporate Cleaners	no application- same reason as above
Stennis Space Center and Miss. Job Bank	applied for work but not hired

(Tr. 74-81).

Concerning his trucking activities, Claimant admitted purchasing a Ford 450 truck and trailer in May, 2000, which was driven by himself, his brother Richard Jones and a friend, Scott Harris. Claimant worked as a lease operator for Jones Motor Freight making 73% of the gross hauling revenues. However, Claimant asserted he never made any profit on this business due to extensive truck repairs involving multiple clutches, transmissions, rear ends, water pumps and drive train with substantial business losses of $30,768.00 in 2000 and $18,302 in 2001. (DEF-8; Tr. 89-99). Claimant testified that following loss of the truck in 2002, he applied for service advisor positions at Robert Levis and Bryan Harris and Slidell Nissan as well as a dispatcher at John Fury but was not hired. Claimant also reapplied at Stennis Space Center and Mississippi Job Bank but was not hired. (Tr. 101-104). Further, Claimant asserted his present condition of

one of constant back pain with weakness in both legs which condition was allegedly made worse by driving. Claimant described the back pain as a hot stabbing pain similar to that he experienced after the alleged November 19, 1999 injury. (Tr. 108).

On cross, Claimant admitted there were no witnesses to his alleged November 17, 1999 injury. (Tr. 109, 110). Contrary to his admission on direct of always having back pain, Claimant denied having any back aches while working as a mechanic. (Tr. 111). When questioned about whether he told Dr. Butler he could not sit or drive for long periods of time, Claimant admitted telling Dr. Butler he could not drive or sit for long periods of time without considerable pain. (Tr. 115). Claimant was evasive when asked if Dr. Butler had told him his back condition pre-dated the alleged injury saying at one point he never told him about a pre-existing back condition only to change that testimony a minute later saying he could not recall such a conversation with Dr. Butler and then stating that the first time he heard it was in court when cross examined (Tr. 119, 120).

Claimant was equally evasive when questioned whether he told Dr. Bolton about his back condition testifying that Dr. Bolton knew of his back problems but passed him on the physical to not remembering what he told Dr. Butler to later admitting that he did not disclose all his health problems because he had to pass the physical in order to get a CDL l. (Tr.124-148). Incredibly, Claimant asserted he had constant and severe back and leg pain and yet it did not affect his ability to drive safely. (Tr. 130). After obtaining the CDL, Claimant then admitted driving considerable distance in 2000 and 2001 to most of states in the Southeastern United States, but allegedly, taking a break every 50 to 60 miles. (Tr. 158-199, 255). Interestingly as noted before, the only driving logs produced for 2002 do not show frequent breaks. (DEF-24).

When cross examined about his business relationship with Ms. Harold, Claimant admitted telling her he had severe problems driving over 30 miles and sitting, standing, or walking for prolonged periods of time. Further, he admitted never telling her about Dr. Bolton, getting a CDL or doing commercial driving leading Ms. Harold to believe he engaged in a limited job search spending most of the day around his house. (Tr. 205-224). Further, he admitted providing false information to Jones Trucking about prior employment with Mitchell trucking while omitting any reference to Employer. (Tr. 227-229). Indeed, while working for Jones Trucking, he drew full disability. (Tr. 232, 233).

D. Testimony of Claimant's Wife, Jillian Jones

Mrs. Jones testified that on November 17, 1999, Claimant came home complaining that he hurt his back at work while installing a leaf spring. Following this injury her husband started a trucking business to supplement his income getting his brother to do some of the driving. When Claimant drove she would accompany him helping him to tie down cargo,and pulling out trailer ramps. (Tr. 645-646).

Mrs. Jones further testified that Claimant drove despite constant pain stopping on many occasions to obtain relief and to allow her the opportunity to drive while he rested. (Tr. 641-642).

As a result of back pain, Claimant cannot play baseball, hold his granddaughter or sleep well. She further testified that she was concerned about her husband driving because of his back condition, but was not concerned about her husband creating a safety hazard because according to her, he would not put others in danger due to his driving. (Tr. 653, 654).

E. Testimony of Drs. Butler and Steiner [8]

In a June 24, 2003 deposition (DEF-27), Dr. Butler testified about his treatment and evaluation of Claimant as previously noted with clinic visits of January 11, February 4, March 8, April 28, 2000, and February 19, 2002, and February 11, 2003. (DEF-2 and 18). Dr. Butler testified that Claimant's spondylolisthesis and degenerative disc disease predated the alleged accident of November 17, 1999. (DEF-27, pp. 21, 22, 30, 31). Spondylolisthesis was a developmental condition coming about in early adulthood and resulting either in symptoms or no symptoms. In this case, Dr. Butler attributed Claimant's symptoms to the spondylolisthesis, which by history or what, Claimant reported was aggravated by the November 17, 1999 alleged injury. (DEF-27, p. 34, 35). Thus, according to Dr. Butler, Claimant's credibility was critical to a determination of whether there was any aggravation of his back condition. (DEF-27, pp. 36, 37).

Dr. Butler testified about inconsistencies in Dr. Bolton's examination and what he found regarding spinal motion and Claimant's history of back problems with Claimant reporting no history of back problems and demonstrating good spinal motion to Dr. Butler. (DEF-27, pp. 49-54). Dr. Butler testified that Claimant never revealed to him Dr. Bolton's examinations and certifications nor his intention to drive a truck. (DEF-27, pp. 55-57). Further, contrary to Claimant's testimony, Dr. Butler told Claimant that his back condition pre-dated the alleged injury and that there was no objective physical findings to corroborate Claimant's injury assertions. (DEF-27, pp. 61-65).

Dr. Butler also testified that *Campbell's Orthopedics* was considered an authoritative source in the field orthopedics and that in chapter 62, *Disorders of the Spine*, it stated that "A spondylolisthesis injury may aggravate symptoms, but rarely does a single injury cause symptoms in a patient who previously had none." (DEF-27, pp. 66, 67).[9] Regarding Claimant's restrictions, Dr. Butler opined that if Claimant had in fact driven trucks, he could continue to do so. (DEF-27, p. 78). Dr. Butler deferred judgment on whether Claimant should undergo spinal surgery without further evaluation and assessment as to Claimant's credibility noting that it was not typical for a patient with Claimant's complaints of significant back and leg pain to go almost two years without seeking medical intervention. (DEF-27, pp. 82-85).

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[8] When confronted with information by Employer's counsel about Claimant's concealment of Dr. Bolton's medical evaluations as well as his driving activities, both Drs. Butler and Steiner questioned the veracity of Claimant's complaints, work limitations, and need for surgery.

[9] Dr. Steiner confirmed the authoritativeness of *Campbell's* textbook utilized to teach student orthopedics and orthopedic surgery. (DEF-26, p.25).

In a July 24, 2003 deposition (DEF-26), Dr. Steiner testified about two evaluations of Claimant on September 19, 2002 and March 27, 2003 as noted previously at CX-13. During the first exam there were no objective physical findings to support Claimant's pain complaints. [10] (DEF-26, p. 16). Straight leg raising in supine and sitting positions were inconsistent. (DEF-26, p. 18). X-rays taken after the alleged injury showed a pre-existing condition involving spondylolisthesis, spondylolysis, degenerative disc disease and hyperetrophic spurring. (DEF-26, p. 20). Dr. Steiner stated that Claimant's spondylolisthesis is rarely made symptomatic or aggravated by a single injury or occurrence. Further, the second exam of March 27, 2003 produced no objective physical findings to support Claimant's pain complaints. (DEF-26, p. 28). Thus, the issue of aggravation rests fundamentally upon subjective complaints and Claimant's credibility. (DEF-26, p. 29).

Dr. Steiner testified about the medical inconsistency of Claimant having low back complaints on a March 30, 2000 FCE, and then to have no such complaints on an April 3, 2000 examination by Dr. Bolton. (DEF-26, pp. 34, 35). Further, Claimant never advised Dr. Steiner about Dr. Bolton when initially seen on September 19, 2002, and never advised Dr. Bolton about his back impairment. (DEF-26, pp. 36-40). Moreover, he never advised Dr. Steiner about being able to pass two DOT physicals. Dr. Steiner opined that if in fact Claimant aggravated his back on November 17, 1999 that aggravation had resolved by the time he first saw Dr. Bolton, and that in fact, Claimant never aggravated his back as claimed. (DEF-26, p. 43, 44).

The following exchange on cross examination provided a good summary of Dr. Steiner's opinion of Claimant:

> Q. Now let me bring you back to Dr. Bolton. Based on your exam of Mr. Jones, based on Dr. Butler's examinations and reports in which you have notes, based on the two FCE's as well as the x-rays and the MRI all of which indicated Mr. Jones spondylolisthesis, is it fair to say that Dr. Bolton could have been incorrect when he found that Mr. Jones had no spine problems?
>
> A. I don't think Dr. Bolton was incorrect. I really think that Mr. Jones is probably not representing his complaints properly to Dr. Butler, to physical therapy, to FCE, and to myself. He wanted to go to work as a truck driver, and he represented what he wanted Dr. Bolton to see so he could go work as a truck driver. Basically Mr. Jones is controlling all of the reports based on what he wants the doctors to say; and so he was able to perform the appropriate maneuver to get a DOT license and drive a truck. He drove a truck. He was able to pass that exam again to drive a truck. And basically if he's able to do that, I'm really thinking that he's probably exaggerating to Dr. Butler and physical therapy what he really feels; and that what he 's representing to Dr. Bolton is most likely the correct physical condition that he has; in other words, the preexisting spondylolisthesis, that's not really symptomatic.

[10] An objective physical finding is one that an examiner can see or feel that the patient does not have control over the result such as reflex abnormality or muscle atrophy. (DEF-26, pp.15, 16).

(DEF-26, pp. 73 ll. 2 to 74 ll. 7).

F. Testimony of Vocational Expert, Angela Harold

Ms. Harold, a certified rehabilitation counselor, testified at length about her evaluation of Claimant and her subsequent but unsuccessful attempts to find work for Claimant, who deceived her about his driving activities and his evaluations by Dr. Bolton. Ms. Harold testified that she telephoned Claimant on October 25, 2000 and learned from Claimant that he was continuing to have back pain and had been restricted by Dr. Butler from returning to his previous employment with Employer. When Ms. Harold attempted to set up a meeting with Claimant, he told her he could not drive to New Orleans or even Slidell which was 30 miles from his home due to back pain and suggested they meet at the Picayune library. (DEF-7, p.1; Tr. 376-380).

Ms. Harold and Mr. Jones met at the Crosby Library in Picayune, Mississippi on November 7, 2000 during which she performed an initial evaluation which was reduced to a nine (9) page report on November 29, 2000. (DEF-7, pp. 3-11). [11] When questioned about his work activities, Claimant failed to disclose his driving activities.[12] Claimant also failed to disclose his evaluation by Dr. Bolton, who had passed Claimant on his DOT physical. (Tr. 384, 385). Claimant claimed he could not drive for over 30 minutes or engage in prolonged standing, walking or sitting and misrepresented facts about daily activities claiming he basically just stayed around the house and had not considered any return to work options. (Tr. 382-397).

In a January 22, and 30, February 2, March 6, 9, 2001 letters to Claimant, Ms. Harold identified the following job openings: shop welder (American Crescent Elevators); call center associate (National Financial Publications), sales (NAPA Auto Parts), cashier (Shell), cashier (Corporate Cleaners). (DEF-7, pp. 16-39). At a February 2, 2001 meeting, Claimant told Ms. Harold he had applied for work at Stennis Space Center, but was not able to work 40 hours per week with daily activities limited to tinkering in yard, picking up leaves and mowing. Claimant told Ms. Harold he has applied for the shop welding position at American Crescent, but not interested in working as a supervisor or for casinos or car dealerships. (Tr. 399-408).

Ms. Harold testified that Claimant failed to tell her about his driver re-certification in March, 2002, and had she known timely about his actual driving ability, she could have provided him with readily available truck driver job openings in 2000 involving heavy work and long haul

[11] In the November 29, 2000 report, Ms. Harold listed the following light to medium work which was consistent with his education and vocational background: dispatcher (construction/trucking) service adviser, shop welder, parts clerk and customer service representative. (DEF-7, p. 9).

[12] Ms. Harold never learned of Claimant's truck driving activities until February, 2002, when Claimant told her he had been driving trucks on a part-time basis. (Tr.38). In-fact, Ms. Harold was stunned to learn at the hearing that Claimant had in fact been working as a truck driver prior to her initial meeting in November, 2000. (Tr. 383).

deliveries in 2000 paying $15.25 to $16.35 per hour, 50 to 60 hours per week with annual wages of $47,580.00 to $57,500.00. (Tr. 427-439, 454-456).

G. Testimony of Joseph Shine

Mr. Shine, who is a physical therapist with certifications in ergonomics and functional capacity evaluations, testified about the two FCE's of March, 2000 and May, 2002 (CX-3, 4) noting that neither FCE utilized computerized equipment which would have provided more objective data. Rather both FCE's relied upon observation and measurable finding and showed what Claimant was willing to do. (Tr. 287, 288, 302-304, 347). On the first FCE, Claimant reported moderate limitations on standing, walking, and sitting on the Dallas Pain Questionnaire, but demonstrated a much better ability in walking and standing on a continuous basis. Claimant had little difficulty lifting and doing repetitive squats despite subjective pain complaints. Further, Claimant demonstrated good strength and range of motion lifting 35 pounds from the floor to waist. (Tr. 293-296).

Mr. Shine noted a big variance in test results on the May, 2002, FCE which absent a subsequent injury should produce results similar to the March, 2000, FCE. Mr. Shine testified that nonetheless both FCE's were found to be valid with consistent internal test results. Further, both FCE's elicited consistent subjective complaints from an apparent cooperative subject. (Tr. 318-337). However, Claimant misrepresented his work status to the second FCE evaluator (Cheshire) telling him he had not worked since the initial alleged work injury. (Tr. 348).

H. Testimony of Jay West

Mr. West, a CPA, in a deposition of June 23, 2003, testified that he examined Claimant's tax returns of 2000 and 2001 and found expenses for fuel and repairs to be very high in relation to the mileage listed, and on some occasions to be unrelated to trucking operations, such as charges for a water heater. Mr. West cited an example where $9,000 was charged for a clutch. Claimant testified about wages for his brother in 2001, but such could be found in the tax return. Claimant also testified about varying rates of reimbursement at $1.0, $1.55, $1.60 and $1.70 per mile. However, none of these amounts times the miles listed in the return agreed with claimed revenue. (DEF-28, pp. 13, 14).

Mr. West adjusted the returns computing a depreciation schedule of 12 and ½ years for the truck, reclassifying expenses and using a reimbursement rate of $1.60 per mile found a true economic income of $27,000 for 2000 and a true economic income of $50,000 for 2001. (DEF-28, pp. 17, 18).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that he aggravated a pre-existing injury of November 17, 1999 and that as a result he is entitled to temporary total disability, inasmuch as he cannot perform his past work for Employer, still needs back surgery, and as of yet Employer has not provided evidence of suitable alternative employment. However, even if Employer showed evidence of suitable work, Claimant proved that such work was not available when he applied for such but was never hired. Further, Claimant is entitled to back surgery under Section 7 of the Act as confirmed by Dr. Butler's testimony which is based upon Claimant's pain complaints, and to disability benefits based upon an average weekly wage of $1,007.45 which includes vacation, holiday and royalty pay plus attorney's fees.

Employer contends that Claimant never injured or aggravated his back condition and as such is entitled to no compensation or medical benefits. Claimant did not establish a Section 20 (a) presumption by failing to establish that an accident or injury occurred in the course and scope of his employment or that conditions existed at work which could have caused him harm or pain. Assuming *arguendo*, that Claimant established a *prima facie* case, Employer rebutted the presumption by medical evidence requiring an analysis of the record as a whole which if done requires a decision in Employer's favor.

Assuming further, that did establish a disabling work injury, Claimant reached MMI on March 8, 2000, per Dr. Butler and does not need spinal surgery. At best, Claimant had a temporary aggravation of a pre-existing condition which ceased upon Claimant's first visit to Dr. Bolton on April 3, 2000.

B. Claimant's Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, 88 S. Ct. 1140, 20 L. Ed. 2d 30 (1968); *Louisiana Insurance Guaranty Assoc. v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467, 88 S. Ct. at 1145-46; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir.1991); *Gilchrist v. Newport News Shipping and Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). The United States Supreme Court has determined, however, that the "true doubt" rule which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 (d) and that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), *aff'g* 990 F.2d 730 (3rd Cir. 1993).

All parties agree that Claimant's credibility is a key issue in this case for without it Claimant is unable to establish any injury or harm, and thus, is not entitled to either compensation or medical benefits. After reviewing the entire record, including Claimant's demeanor on the stand, I am convinced that he was, and is not, a truthful witness and that no accident happened on November 17, 1999 as alleged. In making that determination, I note the following factors: **(1)** there were no witnesses to the alleged injury; **(2)** while objective diagnostic tests including x-rays and a lumbar MRI showed lumbar spondylolisthesis and degenerative disc disease, the overwhelming weight of the medical evidence showed this condition to be preexisting and developmental; **(3)** multiple medical examinations by competent orthopedic surgeon and other physicians showed no objective physical findings to establish any aggravation; **(4)** medical evidence from a leading authority on orthopedic medicine, Dr. Campbell, that it was rare for a person to have spondylolisthesis and be asymptomatic only to have a subsequent injury make such a condition symptomatic; and **(5)** Claimant's lack of medical treatment for significant periods of time after his March 8, 2000 visit to Dr. Butler.

More importantly, Claimant's testimony was filled with contradictions, inconsistencies and evasiveness regarding: (a) the existence of no symptoms pre-accident stating at one point he always had back pain only moments later to deny such (Tr. 65); (b) the presence of leg symptoms following the alleged injury (Tr. 69 ll. 5-15, CX-2 pp. 1-12); (c) a refusal to indicate how long he was limited to driving or sitting when following the injury he clearly told vocational expert Ms. Harold he was not able to drive even a distance of 30 miles from his home to Slidell; (d) concealment of medical history and treatment from treating and examining physicians; (e) concealment of work activities from treating and examining physicians as well as from Ms. Harold. A clear example of incredible testimony was his denial that he knew of a pre-existing back impairment when such was clearly communicated to him by Dr. Butler. Equally incredible was Claimant's statement about having to take frequent breaks when driving when examination of the logs revealed only limited and routine breaks for meals and fuel. In essence, I agree with Dr. Steiner's assessment that Claimant is a manipulative or controlling individual providing only the information necessary to achieve desired results.

C. *Prima Facie* Case

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2) (2003). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary - -
>
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a) (2003).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 615, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer and a *prima facie* case must be established before a claimant can take advantage of the presumption). Once both elements of the *prima facie* case are established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d 287-88.

In order to show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C. Cir. 1968); *Southern Stevedoring Corp. v. Henderson*, 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995) (pre-existing back injuries).

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a "mere fancy or wisp of 'what might have been.'" *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968). A claimant's un-contradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980) (same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or that

conditions existed at work that could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have caused his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976) (finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985) (ALJ) (finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. Unlike occupational diseases, which require a harm particular to the employment, *Leblanc v. Cooper/T. Stevedoring, Inc.*, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as occupational diseases); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease), a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6, 7 (2000), *aff'd on other grounds*, 206 F.3d 474 (5th Cir. 2000). A claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

In *Bolden v. G.A.T.X. Terminals, Corp.*, 30 BRBS 71, 72-73 (1996), the Board affirmed a denial of benefits when the ALJ determined that the claimant was not a credible witness and negated the claimant's contentions that he suffered a work related accident. Specifically, the claimant related his injury to a specific traumatic event, but the ALJ noted: 1) the claimant was confused over the date of the incident; 2) a physician remarked that the claimant had experienced pain two weeks prior to the alleged accident; 3) neither the claimant nor his physician related the pain to the claimant's work during, or soon after the alleged event occurred; and 4) the claimant failed to report the injury to his employer promptly. *Id*. at 72. Similarly, the ALJ discredited the testimony of the claimant's co-workers and wife because their statements concerning the claimant's physical condition did not establish the date of the alleged traumatic event. *Id*. Finally, the ALJ noted that no physician, outside of those who took the claimant's version of events at face value, could establish that a specific event cause the claimant's injuries. *Id*. at 72-73. Accordingly, the claimant in *Bolden* failed to establish the second prong of the *prima facie* case because he failed to establish that a traumatic event, or conditions that existed at work, could have caused his harm. *Id*. at 73.

Degenerative changes not caused by working conditions are not compensable as traumatic injuries. *Lennon v. Waterfront Transport*, 20 F.3d 658, 663 (5th Cir. 1994) (degenerative disc disease); *Director v. Bethlehem Steel Corp.*, 620 F.2d 60, 64-65 (5th Cir. 1980) (degenerative lumbar disc changes not caused by working conditions are not compensable as traumatic injuries. *Lennon v. Waterfront Transport*, 20 F.3d 658, 663 (5th Cir. 1994) (degenerative disc disease); *Director v. Bethlehem Steel Corp.*, 620 F.2d 60, 64-65 (5th Cir. 1980).

In the present case as noted above, I find Claimant to be an incredible witness and do not credit his assertion of an injury or accident on November 17, 1999, and thus, find he failed to establish a *prima facie.* While he may indeed have degenerative changes and spondylolisthesis, he did not aggravate such a condition at work. As such he is not entitled to benefits. However, assuming *arguendo* Claimant did establish a *prima facie* case, such was rebutted by Employer who on the basis of the entire record showed that Claimant's back condition was neither caused nor aggravated by any work place accident or injury.

Accordingly, Claimant's claim for compensation and medical benefits is denied.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE